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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

BENJAMIN LE,

Plaintiff and Appellant,

v.

OXFORD GLOBAL RESOURCES, LLC,  
et al.,

Defendants and Respondents.

H044955

(Santa Clara County  
Super. Ct. No. 16CV298735)

**I. INTRODUCTION**

Plaintiff Benjamin Le filed a civil action against defendant Oxford Global Resources, LLC (Oxford) and defendant Nutanix, Inc. (Nutanix). Oxford was in the business of hiring consultants to work at other companies, such as Nutanix. Plaintiff alleged that defendants promised him employment with a specific start date, but that defendants ultimately did not employ him. In the meantime, he allegedly resigned from his existing employment and refrained from pursuing other opportunities. In the operative first amended complaint, plaintiff alleged causes of action against both defendants for promissory estoppel, breach of an implied contract, breach of the implied covenant of good faith and fair dealing, and negligent misrepresentation, as well as a cause of action for fraud against only Oxford.

Both defendants demurred to the pleading. The trial court sustained both demurrers without leave to amend, except that it sustained the demurrer by Oxford to the fraud claim with leave to amend. After plaintiff elected not to amend the fraud claim, judgments were entered in favor of defendants. On appeal, plaintiff contends that the trial court erred in sustaining both defendants' demurrers.

For reasons that we will explain, we determine that Oxford's demurrer to the fraud cause of action should have been overruled. We will therefore (1) reverse the judgment in favor of Oxford and direct the trial court to enter a new order overruling the demurrer to the fraud cause of action, and (2) affirm the judgment in favor of Nutanix.

## **II. FACTUAL BACKGROUND**

Our summary of the facts is drawn from the allegations of the first amended complaint, since we must assume the truth of the properly pleaded factual allegations in reviewing an order sustaining a demurrer. (*Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 42 (*Committee for Green Foothills*); (*People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 300 (*Lungren*).)

### **A. The Parties**

Oxford was a staffing and recruiting firm that hired consultants and assigned them to work on a temporary basis at other companies. Oxford recruited plaintiff for the position of "Devops Engineer" at Nutanix. Oxford indicated to plaintiff in an e-mail that the position would be for three months, but that it could become a permanent position if he performed well during the three-month period.

### **B. The Initial Communications Leading to a Written Consultant Agreement**

In mid-January 2016, Oxford set up phone and in-person interviews of plaintiff by Nutanix. Outside of these interviews, plaintiff did not communicate directly with Nutanix regarding the engineer position. Instead, all the information that plaintiff received about the Nutanix position was from Oxford.

After the interviews, Oxford informed Nutanix that plaintiff wanted “ ‘to be a part of Nutanix,’ ” but that plaintiff had upcoming interviews with other companies. Nutanix responded to Oxford that it liked plaintiff and wanted to “ ‘move forward.’ ” Oxford communicated this fact to plaintiff that “ ‘Nutanix wants to move forward’ ” and that Oxford was “ ‘waiting on the formal offer which we should have shortly.’ ”

A few days later, on January 25, 2016, Oxford told Nutanix that plaintiff was “ ‘looking forward to coming on board in the next two weeks.’ ” Oxford and Nutanix thereafter negotiated plaintiff’s hourly pay. Oxford subsequently told plaintiff that a Nutanix employee “ ‘went to his Boss to get final sign off’ ” and that the Nutanix employee had stated that “ ‘he should have it wrapped up by noon tomorrow.’ ”

On January 27, 2016, Oxford and Nutanix agreed to an hourly rate for plaintiff’s services. Nutanix thereafter asked Oxford to have its “ ‘legal team put together a contract based off the last one [they] did.’ ” Oxford responded affirmatively stating that it would “ ‘get this taken care of first thing in the morning.’ ”

That same day, on January 27, 2016, Oxford texted the following to plaintiff: “ ‘Congrats Ben. I emailed you the details. Please bring a valid US passport, a drivers license and social security card. Bring a voided check for direct deposit. See you tomorrow at 9am.’ ” Oxford also e-mailed its address to plaintiff.

### ***C. The January 28, 2016 Written Consultant Agreement***

The next day, on January 28, 2016, Oxford and plaintiff signed a one-page “consultant agreement.” (Capitalization omitted.) The agreement described Oxford as being “engaged in the business of assigning consultants to perform services on a temporary basis to third-party businesses,” which the agreement referred to as “Clients.” The agreement identified plaintiff as a “Consultant.”

According to the agreement, plaintiff “shall be an employee of Oxford while on any assignment” and “is not an employee of any Client.” The agreement provided that plaintiff’s hourly rate of pay would be \$90. The agreement also provided that plaintiff

would submit his work time through an electronic timekeeping system; that he would keep specified information concerning Oxford or its clients confidential; that he would complete certain forms and provide required documents within three business days of his start date; and that he would not knowingly transfer specified technology, items, or products of the client to any foreign entity without written authorization from Oxford and the client.

Regarding termination, the consultant agreement stated as follows: “Consultant agrees to provide Oxford five (5) business days notice of intent to terminate any assignment with Oxford. Consultant understands that the length of any assignment may be terminated at will by the Client. Accordingly, no advance notice of termination of an assignment from the Client or from Oxford is required. Subject to the aforementioned notice provisions applicable to the Consultant, employment is at the mutual consent of Consultant and Oxford. Consequently, either Consultant or Oxford may terminate the employment relationship at will, at any time, with or without cause or advance notice.”

The consultant agreement further stated that it “constitutes the entire agreement between Oxford and Consultant with respect to the subject matter therefore. All prior agreements, representations, statements, negotiations and undertakings are superseded hereby. The agreement may be altered, varied, revised, amended or otherwise modified only in writing signed by both Oxford and Consultant.”

Near the bottom of the consultant agreement, several lines were filled in with information that was specific to plaintiff’s proposed position with Nutanix. The agreement indicated that Nutanix was the “Client Company,” and that the “Consultant Position/Title” was “Devops Engineer.” The agreement set forth the address of the work location, the manager to whom plaintiff would report, the hours of work (40 hours, Monday through Friday), and a “Start Date” of February 15, 2016. Immediately below the line indicating the start date of February 15, 2016, the agreement stated, “(Subject to change or cancellation by Client).”

***D. Plaintiff's Resignation from His Existing Employment***

Both defendants were aware that plaintiff was already employed and that he would need to resign from his job before starting new employment. On January 28, 2016, after signing the consultant agreement, plaintiff notified his employer that he would be resigning to take the position with defendants. Upon plaintiff giving notice, the employer summarily terminated plaintiff's employment.

***E. Plaintiff Never Commences Work at Nutanix***

On January 28, 2016, after Oxford and plaintiff had signed the consultant agreement, Oxford requested that Nutanix sign a "Statement of Work" regarding plaintiff. Oxford and Nutanix thereafter discussed whether a new master consulting agreement was required between them regarding plaintiff, or whether they could simply agree to a "Statement of Work" that referred to their existing master consulting agreement. The legal departments of Oxford and Nutanix "became involved in the conversation."

On February 1, 2016, Oxford asked whether Nutanix had received an e-mail from Oxford's legal counsel, as Oxford wanted to make sure that they " 'properly handle[d] the new [Statement of Work] for the services of [plaintiff].' " Nutanix indicated that its legal team was looking into it.

On February 3, 2016, Oxford again asked Nutanix about " 'any new updates from [Nutanix's] legal team.' " Nutanix indicated that it would reach out to its legal team again.

On February 4, 2016, Oxford again contacted Nutanix. Oxford stated, " '[Plaintiff] is looking forward to jumping onboard with your team in another week. Is there anything I should be concerned about? The reason I ask is because your legal team doesn't seem to be responding to help sign off on the [Statement of Work] that's tied to the contract that we worked so hard to make happen. If I'm worrying ways are unnecessary [sic], please let me know.' "

A few days later, on February 8, 2016, Oxford confirmed by text with plaintiff that he was “all set for a start at Nutanix on Monday, 2/15.” Plaintiff responded, “ ‘Absolutely, everything is good for next Monday.’ ”

On February 9, 2016, Oxford asked Nutanix what time plaintiff should arrive for work on February 15, 2016. Nutanix responded, “ ‘You didn’t tell [plaintiff] that his start date is on the 15th did you? We haven’t finalized the contract yet.’ ” Oxford replied to Nutanix that plaintiff had to give notice to his employer, and that “ ‘[t]his should not be an issue since the contract has been agreed upon and signed by both parties.’ ” Nutanix responded, “ ‘I’m not sure I understand what you mean – Why did he have to put in his notice? I told you that he shouldn’t do a single thing until we have a fully signed contract in place. I don’t want another [REDACTED] situation on our hands.’ ” Oxford replied, “ ‘We had our legal teams negotiate and sign a twelve page Master Agreement between Nutanix and Oxford along with a Statement of Work page for [REDACTED]. That signed Master Agreement outlines the terms for how we work for any consulting engagement going forward. Anytime, . . . an offer is made to a new consultant, we fill out the Nutanix SOW for that individual which refers back to the Nutanix/Oxford Master Agreement.’ ” Nutanix responded, “ ‘Understood, and thanks. Although I’m not going to claim I understand that document, what I do know is that I need our corporate controller to sign anything that has to do with payment terms – and he will not do so until its [sic] cleared by legal.’ ” Oxford replied, “ ‘I totally understand. The legal terms in that contract totally go over my head. Getting the [Statement of Work] for [plaintiff] signed by your legal team needs to get done this week or things could get ugly. However [plaintiff] is much nicer than [REDACTED].’ ”

Nutanix responded, “ ‘I’ll escalate this. But I’m wondering why we gave [plaintiff] a start date before the contract was finalized? He also needs to go through the HR process and they’re not too happy with how I rushed the [REDACTED] new hire through last time.’ ” Oxford replied, “ ‘If we hadn’t acted on our side at the time you

decided you wanted to move forward with [plaintiff], he would not have been available at all. He had an offer on the table and three other interviews scheduled for the same week. All of those other opportunities were through other agencies. It has been almost three weeks . . . since you decided you wanted to move forward with [plaintiff]. Crazy things can happen in that span of time.’ ” Nutanix responded, “ ‘Understood. But I’d rather lose a candidate than have him submit his resignation and not work (or be paid) for couple of weeks due to my legal team’s slowness to respond.’ ” Nutanix further stated, “ ‘The thing that happened to [REDACTED] was real burden for everybody and I’m not looking to have that happen again.’ ”

On or about February 12, 2016, Nutanix “by and through” Oxford told plaintiff that his start date would be delayed until February 22, 2016. Oxford indicated to plaintiff that the reason for the delay was that Nutanix’s offices would be closed for President’s Day on Monday February 15, 2016, and that plaintiff’s workstation had not been set up yet.

On February 18, 2016, Oxford asked Nutanix whether everything was “ ‘good’ ” for plaintiff to start on Monday, February 22, 2016. Nutanix responded, “ ‘Sorry, we are not ready for [plaintiff] on Monday. I don’t have an approved PO or the contract signed. Please stand by.’ ”

On February 19, 2016, Oxford asked Nutanix, “ ‘Is there any chance that everything can come together before the end of the day so I don’t have to make a unpleasant phone call to [plaintiff]? It’s coming up on a month since [plaintiff] was selected for the role. Is there an underlying reason for the delay? Please let me know.’ ”

On February 24, 2016, Oxford again asked Nutanix, “ ‘Can you please let me know if we should tell [plaintiff] that this Nutanix role is not going to happen? I’d appreciate your input.’ ” That same day, Oxford told plaintiff that Nutanix was on a hiring freeze and that there would be no job opportunity at Nutanix at that time.

In early March 2016, plaintiff asked Oxford whether there had been any change in circumstances at Nutanix regarding his anticipated employment, but he received no response from Oxford. Plaintiff alleged that he “has not heard from any of the [d]efendants since,” and there is no allegation that he ever started working for Oxford or Nutanix.

Plaintiff further alleged that when Oxford communicated with him, it acted as the agent of Nutanix. Even if Oxford was not an actual agent of Nutanix, Nutanix allegedly intentionally or carelessly created the impression that Oxford was acting as an agent of Nutanix in the dealings and communications with plaintiff. Nutanix allegedly did so by interviewing plaintiff multiple times in meetings set up by Oxford, by allowing Oxford to communicate all the details concerning the job negotiations to plaintiff, and by failing to inform plaintiff that Oxford was not an agent. Plaintiff alleged that he reasonably believed Oxford was acting as the agent of Nutanix.

### **III. PROCEDURAL BACKGROUND**

#### ***A. The Pleadings***

Plaintiff filed his original complaint in August 2016. He alleged two causes of action for (1) promissory estoppel and (2) breach of contract against both defendants. The contract claim was based on the consultant agreement, a copy of which was attached to the complaint. Oxford demurred to both causes of action on the ground that plaintiff failed to state facts sufficient to constitute a cause of action. The trial court sustained the demurrer to each cause of action with leave to amend. Nutanix also filed its own demurrer to the complaint. It appears from the record that, before the trial court ruled on Nutanix’s demurrer, plaintiff filed the first amended complaint which rendered Nutanix’s demurrer moot.

Plaintiff filed the first amended complaint in December 2016. The amended complaint contained five causes of action. Four causes of action were alleged against both defendants: (1) promissory estoppel, (2) breach of an implied contract, (3) breach of

the implied covenant of good faith and fair dealing, and (4) negligent misrepresentation. A fifth cause of action, (5) fraud, was alleged against Oxford only. The consultant agreement was again attached to the pleading. Plaintiff sought to hold Nutanix liable for Oxford's alleged misdeeds based on allegations that Oxford was an agent for Nutanix.

## ***B. The Demurrers***

### **1. Oxford's Demurrer**

Defendant Oxford demurred to all five causes of action on the ground that plaintiff failed to state facts sufficient to constitute a cause of action.

First, regarding promissory estoppel, which was based on defendants' alleged promise that plaintiff would be employed at Nutanix beginning February 15, 2016, Oxford contended that plaintiff failed to sufficiently allege an unambiguous promise and reasonable reliance in view of the language of the written consultant agreement, which provided that plaintiff would be an employee of Oxford and that his start date was subject to cancellation.

Second, regarding breach of an implied contract, which was based on defendants allegedly entering into an implied contract with plaintiff that he would be an engineer with Nutanix starting on February 15, 2016, Oxford contended that plaintiff's allegations regarding the existence and terms of an implied contract improperly contradicted the terms of the parties' written consultant agreement.

Third, regarding breach of the implied covenant of good faith and fair dealing, which was based on the allegation that defendants did not permit plaintiff to start employment in the position for which he had been selected, Oxford contended that plaintiff failed to sufficiently allege the existence of an underlying implied contract, and therefore no claim for breach of an implied covenant could be stated. Further, to the extent the contract between the parties was the written consultant agreement, Oxford contended that the allegations were insufficient to establish that it breached the implied covenant of good faith and fair dealing with respect to that contract.

Fourth, regarding negligent misrepresentation, which was based on defendants' alleged representation that Nutanix had arranged for plaintiff to start working at Nutanix on February 15, 2016, Oxford contended that plaintiff failed to sufficiently allege an express misrepresentation or justifiable reliance in view of the terms of the written consultant agreement.

Fifth, regarding fraud, which was based on Oxford's alleged misrepresentation that plaintiff had been selected for a position with Nutanix and/or Oxford's alleged failure to disclose that Nutanix did not want plaintiff to resign from his existing employment, Oxford contended that plaintiff failed to sufficiently allege a misrepresentation or justifiable reliance in light of the terms of the written consultant agreement.

## **2. Nutanix's Demurrer**

Defendant Nutanix demurred to all four causes of action alleged against it on the ground that plaintiff failed to state facts sufficient to constitute a cause of action.

First, regarding promissory estoppel and the alleged promise of a February 15, 2016 start date for employment, Nutanix contended that there was no allegation that it made any promise to plaintiff; the agency allegations were insufficient to hold Nutanix liable for Oxford's alleged promise; and to the extent Oxford made a promise for which Nutanix may be bound, the promise was ambiguous and superseded by the integrated written consultant contract.

Second, regarding breach of an implied contract, Nutanix contended that it was not a party to any contract with plaintiff, and that there was no breach because plaintiff was an at-will employee who could be discharged at any time.

Third, regarding breach of the implied covenant of good faith and fair dealing, Nutanix contended that plaintiff failed to sufficiently allege the existence of a contract between the two parties and therefore no claim for breach of an implied covenant could be stated.

Fourth, regarding negligent misrepresentation, Nutanix contended that all the alleged representations were made by Oxford, and that the agency allegations were insufficient to hold Nutanix liable for Oxford's representations.

### ***C. Opposition to the Demurrers***

In opposition to Oxford's demurrer, plaintiff contended that he sufficiently alleged promissory estoppel, negligent misrepresentation, and fraud based on the promise of a specific job at Nutanix. He argued that the "[s]ubject to . . . cancellation" language in the written consultant agreement "was simply a restatement of the at-will doctrine that would apply upon commencement of the job, rather than a complete disclaimer" of any promise. (Italics omitted.) Plaintiff further contended that the written consultant agreement was unenforceable for lack of consideration, and therefore there was no conflict between that agreement and the causes of action for breach of an implied contract and breach of the implied covenant of good faith and fair dealing.

In opposition to Nutanix's demurrer, plaintiff made similar arguments. Plaintiff also contended that he sufficiently alleged an ostensible agency relationship between Nutanix and Oxford, and therefore Nutanix could be held liable for the promises and representations of its agent Oxford.

### ***D. The Trial Court's Order***

After a hearing on the demurrers, the trial court filed an order sustaining both demurrers by Oxford and Nutanix. In the order, the court observed that plaintiff had added three causes of action to the first amended complaint without leave of court. Those causes of action—the third cause of action for breach of the implied covenant of good faith and fair dealing, the fourth cause of action for negligent misrepresentation, and the fifth cause of action for fraud—were therefore subject to being struck on the court's own motion. However, the court stated that, because "both demurring [d]efendants . . . addressed the additional claims alleged against them, the Court [would] treat the third, fourth and fifth causes of action as though they had [been] properly added."

Starting with the written consultant agreement, the trial court observed that the agreement stated that the start date of plaintiff's assignment was "[s]ubject to change or cancellation by Client," that is, Nutanix. Based on this language, the court determined that " 'the promise in the Agreement was, at most, to attempt to get Plaintiff work, subject to the whim of Nutanix, and not a guarantee of placement. Accordingly, the promise in the Agreement was ambiguous as to whether the job would even start.' " The court further determined that the "[s]ubject to change or cancellation" language in the consultant agreement was not ambiguous and was not reasonably susceptible to the interpretation alleged by plaintiff that the assignment could not be withdrawn before employment began with the client. The court stated: "To the contrary, 'cancellation' in this context clearly means an assignment can be canceled by the client before it started even if it had previously been scheduled to begin on a date certain." Turning to the specifics of each defendant's demurrer, the court ruled as follows.

### **1. Oxford's Demurrer**

Regarding the first cause of action for promissory estoppel, the trial court sustained Oxford's demurrer without leave to amend. The court found that the express and unambiguous terms of the consultant agreement controlled over plaintiff's contrary allegations that he was promised employment at Nutanix with a start date of February 15, 2016. The court determined that plaintiff therefore knew, or reasonably should have known, at the time he signed the consultant agreement that there was no clear and unambiguous promise by either defendant that he would be assigned to work at Nutanix. As a result, plaintiff could not have reasonably relied on such an alleged promise when he thereafter gave his resignation notice to his employer. Further, in view of the language in the consultant agreement that it constituted the entire agreement between the parties, that all prior representations were superseded by the consultant agreement, and that any changes could only be accomplished by a writing signed by both

plaintiff and Oxford, the court concluded that it was not reasonable for plaintiff to rely on any post-signing communications from Oxford.

Regarding the second cause of action for breach of an implied contract, the trial court sustained Oxford's demurrer without leave to amend. The court determined that the alleged implied contract—that plaintiff would start working on February 15, 2016 with Nutanix—contradicted the terms of the written consultant agreement, which provided that the assignment was subject to cancellation by the client Nutanix and which controlled over any contrary allegations.

Regarding the third cause of action for breach of the implied covenant of good faith and fair dealing, the trial court sustained Oxford's demurrer without leave to amend. The court determined that an act permitted by the express terms of a contract could not be a breach of the implied covenant of good faith dealing. In this case, the consultant agreement expressly provided that the assignment was subject to cancellation by Nutanix. Consequently, plaintiff could not have reasonably believed otherwise after signing the agreement and when he thereafter submitted his resignation with his employer.

Regarding the fourth cause of action for negligent misrepresentation, the trial court sustained the demurrer without leave to amend. The court determined that plaintiff failed to allege the claim with the requisite particularity. Further, plaintiff could not have reasonably relied on an alleged representation that he would start working with Nutanix on a specified date in view of the language in the consultant agreement stating that the assignment was subject to cancellation by Nutanix. Moreover, regarding Oxford's alleged continued representation that plaintiff would start an assignment with Nutanix even after Oxford knew Nutanix was going to cancel, plaintiff (a) could not have reasonably relied on any statement that Nutanix would not exercise a right it had under the consultant agreement, and (b) a negligent misrepresentation claim may not be based on a promise of future action.

Regarding the fifth cause of action for fraud, the trial court sustained the demurrer but with leave to amend. Plaintiff alleged that Oxford knew Nutanix might cancel the assignment, but that Oxford withheld this information from him. The court determined that plaintiff failed to allege sufficient facts showing that Oxford had a duty to disclose the information and resulting damage.

## **2. Nutanix's Demurrer**

The trial court sustained Nutanix's demurrer to the four causes of action alleged against it without leave to amend. The court determined that plaintiff failed sufficiently allege that Oxford was the ostensible agent of Nutanix. Further, even if plaintiff sufficiently alleged an agency relationship, plaintiff still failed to state sufficient facts in the first four causes of action as explained with respect to Oxford's demurrer.

### ***E. The Judgments***

Although the trial court gave plaintiff the opportunity to amend the fifth cause of action for fraud against Oxford, plaintiff declined to do so. Judgments were subsequently entered against plaintiff and in favor of Oxford and Nutanix.

## **IV. DISCUSSION**

Plaintiff contends the trial court erred in sustaining the demurrers by both defendants. We first set forth the standard of review before analyzing Oxford's demurrer and then Nutanix's demurrer.

### ***A. Standard of Review***

On appeal, "the plaintiff bears the burden of demonstrating that the trial court erred" in sustaining the demurrer. (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 879.) In reviewing "an order sustaining a demurrer, 'we examine the complaint de novo to determine whether it alleges facts sufficient to state a cause of action.' " (*Committee for Green Foothills, supra*, 48 Cal.4th at p. 42.) We assume the truth of all facts properly pleaded by the plaintiff. (*Lungren, supra*, 14 Cal.4th at p. 300.) "We also accept as true all facts that may be implied or inferred from those expressly alleged.

[Citations.]” (*Curcini v. County of Alameda* (2008) 164 Cal.App.4th 629, 633, fn. 3.) Further, “facts appearing in exhibits attached to the complaint will also be accepted as true and, if contrary to the allegations in the pleading, will be given precedence. [Citation.]” (*Dodd v. Citizens Bank of Costa Mesa* (1990) 222 Cal.App.3d 1624, 1627). We “ ‘give the complaint a reasonable interpretation by reading it as a whole and all its parts in their context. [Citations.] We do not, however, assume the truth of contentions, deductions, or conclusions of fact or law.’ [Citation.]” (*Lungren, supra*, at pp. 300-301.)

If the trial court gives the plaintiff leave to amend the pleading, the plaintiff may choose to not amend and to instead challenge the court’s ruling sustaining the demurrer in an appeal from the subsequent dismissal of the action. (*County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292, 312.) When a demurrer is sustained without leave to amend, “ ‘[t]he plaintiff has the burden of proving that an amendment would cure the defect.’ ” (*Campbell v. Regents of University of California* (2005) 35 Cal.4th 311, 320.)

## **B. Oxford’s Demurrer**

### **1. First Cause of Action for Promissory Estoppel**

Plaintiff contends that he sufficiently alleged a cause of action for promissory estoppel. In the first amended complaint, plaintiff alleged that, through oral and written communications, including the written consultant agreement, defendants promised that he would start working at Nutanix on February 15, 2016. Plaintiff alleged that he reasonably relied on defendants’ promises by quitting his existing employment and by refraining from pursuing other opportunities. Plaintiff further alleged that the language in the written consultant agreement that the start date was “[s]ubject to change or cancellation by Client” did not mean that his work assignment could be withdrawn before employment began. Plaintiff alleged that the written consultant agreement would be “meaningless” if his work assignment could be withdrawn before he even started.

**a. Legal principles regarding promissory estoppel**

“In California, under the doctrine of promissory estoppel, ‘[a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. . . .’ [Citations.] Promissory estoppel is ‘a doctrine which employs equitable principles to satisfy the requirement that consideration must be given in exchange for the promise sought to be enforced.’ [Citation.]” (*Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority* (2000) 23 Cal.4th 305, 310.) In other words, “[u]nder the doctrine of promissory estoppel, the promise by one party and the resulting detrimental reliance on that promise by another party operate as a substitute for consideration . . . .” (*Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 307, 320.) “The elements of a promissory estoppel claim are ‘(1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) [the] reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his reliance.’ [Citation.]” (*US Ecology, Inc. v. State of California* (2005) 129 Cal.App.4th 887, 901 (*US Ecology*)).

**b. Analysis**

In this case, the written consultant agreement between plaintiff and Oxford expressly stated that the February 15, 2016 start date for plaintiff’s assignment at Nutanix was “[s]ubject to change or cancellation by [the] Client,” Nutanix. Thus the written consultant agreement did not provide a “ ‘clear and unambiguous’ ” promise by Oxford that plaintiff would start working at Nutanix on February 15, 2016. (*US Ecology, supra*, 129 Cal.App.4th at p. 901.)

To the extent Oxford allegedly promised *prior* to the signing of the written consultant agreement that plaintiff would start at Nutanix on a certain date, such an alleged promise would have been superseded by the written consultant agreement. In this

regard, the written consultant agreement states that it “constitutes the entire agreement between Oxford and Consultant [(plaintiff)] with respect to the subject matter therefore. All prior agreements, representations, statements, negotiations and undertakings are superseded hereby.” “[T]he terms contained in an integrated written agreement may not be contradicted by prior or contemporaneous agreements.” (*Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, 344 (*Casa Herrera*); see *id.* at p. 346 [“an integrated written agreement *supersedes* any prior or contemporaneous promise at variance with the terms of that agreement”].)

Based on the allegations of the first amended complaint, there also could not have been a clear and unambiguous promise *after* the signing of the consultant agreement regarding a specific start date, and plaintiff could not have reasonably relied on any alleged promise of a specific start date after he signed the agreement. As we have explained, the written consultant agreement expressly provided that the start date was “[s]ubject to change or cancellation by” Nutanix. The written consultant agreement further provided that it “may be altered, varied, revised, amended or otherwise modified only in writing signed by both Oxford and Consultant [plaintiff].” There is no allegation in plaintiff’s first amended complaint that such a signed modification exists regarding a specific start date at Nutanix. Consequently, upon signing the written consultant agreement, any subsequent act by plaintiff in reliance on an alleged promise of a particular start date at Nutanix, including his act of resigning from his existing employment, would not have been reasonable. (See *Malmstrom v. Kaiser Aluminum & Chemical Corp.* (1986) 187 Cal.App.3d 299, 319 [“reliance on representations that contradict a written agreement is not reasonable”].)

In sum, based on the express language of the written consultant agreement, there was (1) no clear and unambiguous promise by Oxford that plaintiff would actually start working at Nutanix on February 15, 2016, and (2) any act taken by plaintiff in reliance on that start date after signing the agreement would not have been reasonable.

Plaintiff contends that his case is similar to three other cases where the courts have allowed promissory estoppel claims: *Sheppard v. Morgan Keegan & Co.* (1990) 218 Cal.App.3d 61 (*Sheppard*), *Grouse v. Group Health Plan, Inc.* (Minn. 1981) 306 N.W.2d 114 (*Grouse*), and *Toscano v. Greene Music* (2004) 124 Cal.App.4th 685 (*Toscano*). We find all three causes factually distinguishable.

In *Sheppard*, the plaintiff accepted an offer to work in Memphis and quit his job in California. (*Sheppard, supra*, 218 Cal.App.3d at pp. 64-65.) Plaintiff “was to start on the payroll” at the Memphis job in mid-September “and commence working full time on October 3.” (*Id.* at p. 65.) On October 1, the new employer “decided to ‘separate’ him before he began actively working.” (*Ibid.*) The plaintiff sued the new employer for breach of contract, fraud, and wrongful termination. (*Id.* at p. 64.) The trial court granted summary judgment in favor of the employer, but the appellate court reversed the judgment. (*Id.* at pp. 64, 68.) The appellate court explained that under the doctrine of promissory estoppel, a “ ‘promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.’ [Citation.]” (*Id.* at p. 67.) Applying this doctrine, and quoting from *Grouse, supra*, 306 N.W.2d 114, the appellate court in *Sheppard* stated “ ‘that under the facts of this case the [plaintiff] had a right to assume he would be given a good faith opportunity to perform his duties to the satisfaction of [defendant] once he was on the job.’ [Citation.]” (*Ibid.*)

In *Grouse*, on which *Sheppard* relied in applying the doctrine of promissory estoppel, the prospective employer made a “firm offer” of employment to the plaintiff, who accepted the offer but indicated that he would need to give two weeks’ notice to his current employer. (*Grouse, supra*, 306 N.W.2d at pp. 116, 115.) The prospective employer called back later to confirm that the plaintiff had resigned from his existing employment. (*Ibid.*) The prospective employer subsequently hired someone else to fill

the position. (*Id.* at p. 116.) The Supreme Court of Minnesota determined that the plaintiff could seek damages under the theory of promissory estoppel. (*Ibid.*) The court reasoned that the prospective employer knew that the plaintiff would have to resign from his existing employment, the plaintiff promptly gave notice of his resignation, and the plaintiff informed the prospective employer that he had done so when specifically asked. The court determined that “[u]nder these circumstances it would be unjust not to hold [the prospective employer] to its promise.” (*Id.* at p. 116.)

In *Toscano*, the plaintiff was offered employment starting on September 1. (*Toscano, supra*, 124 Cal.App.4th at p. 689.) A month prior to that date, on August 1, the plaintiff resigned from his existing job. (*Ibid.*) In mid-August, however, the prospective employer withdrew the offer. (*Id.* at pp. 689-690.) Plaintiff’s claim for promissory estoppel was the only claim that survived summary adjudication. (*Id.* at p. 690.) At issue on appeal was the proper measure of damages. (*Id.* at p. 689.) The appellate court concluded that the plaintiff, “who relinquished his job in reliance on an unfulfilled promise of employment, may on an appropriate showing recover the lost wages he would have expected to earn from his former employer but for the defendant’s promise.” (*Id.* at p. 693.)

Unlike the facts in *Sheppard*, *Grouse*, and *Toscano*, plaintiff in this case did not have a clear and unambiguous start date with Nutanix. In each of the cited cases, the prospective employer provided a firm start date, or otherwise did not indicate that the offer of employment was subject to change or revision. (*Sheppard, supra*, 218 Cal.App.3d at 65 [October 3 start date]; *Grouse, supra*, 306 N.W.2d at p. 116 [“firm offer” of employment]; *Toscano, supra*, 124 Cal.App.4th at p. 689 [September 1 start date].) In contrast, the written consultant agreement between Oxford and plaintiff expressly stated that the start date was “[s]ubject to change or cancellation” by the client Nutanix.

Plaintiff makes several contentions regarding the unenforceability of the written consultant agreement and regarding the proper interpretation of the “[s]ubject to change or cancellation” language. We address each of plaintiff’s contentions below.

**i. Whether the written consultant agreement was a contract**

Plaintiff contends that the written consultant agreement was not a contract. Plaintiff argues: “California courts have repeatedly held that in the employment context, language in an employee policy (or an offer letter) only becomes contractual upon performance of labor by the employee. This concept has been categorized as one of ‘unilateral contract.’ At best, the ‘Consultant Agreement’ was an offer to make a unilateral contract, which [plaintiff] could accept only by performance, i.e., commencing to work for [defendants].” (Italics omitted.) In support of this argument, plaintiff cites a footnote from a California Supreme Court opinion in which the court states, “An employment contract in which the employer promises to pay an employee a wage in return for the employee’s work is typically described as a unilateral contract.” (*Asmus v. Pacific Bell* (2000) 23 Cal.4th 1, 10, fn. 4 (*Asmus*).)

We are not persuaded by plaintiff’s argument that the written consultant agreement in this case was a unilateral contract that could only be accepted by plaintiff by commencing work with defendants. “In a unilateral contract, there is only one promisor . . . . [Citation.]” (*Asmus, supra*, 23 Cal.4th at p. 10.) “[T]he promisor does not receive a promise in return as consideration. [Citations.]” (*Ibid.*) Instead, “[t]he promise is given in consideration of the promisee’s act or forbearance. As to the promisee, in general, any act or forbearance . . . may constitute consideration for the promise. [Citations.]” (*Ibid.*) In other words, “[a] unilateral contract is one that is accepted by performance. (. . . *Los Angeles Traction Co. v. Wilshire* (1902) 135 Cal. 654, 658 [a unilateral contract is ‘a mere offer that, if subsequently accepted and acted upon by the other party to it, would ripen into a binding, enforceable obligation’] . . . .)”

(*Cal Fire Local 2881 v. California Public Employees' Retirement System* (2019) 6 Cal.5th 965, 988.)

By comparison, “[a] bilateral contract is one in which there are mutual promises given in consideration of each other. [Citations.] The promises of each party must be legally binding in order for them to be deemed consideration for each other. [Citation.] [¶] If a party is not assuming a legal duty in making a promise, the agreement is not binding as a bilateral contract. . . . ‘In other words, for the contract to bind either party, both must have assumed some legal obligations. Without this mutuality of obligation, the agreement lacks consideration and no enforceable contract has been created. [Citations.]’ [Citation.]” (*Bleecher v. Conte* (1981) 29 Cal.3d 345, 350.)

In this case, the parties’ written consultant agreement contained promises by *both* Oxford and plaintiff. Oxford promised to pay plaintiff \$90 per hour for the assignment to work at the client company, Nutanix. The several promises by plaintiff included that he would submit his work time through an electronic timekeeping system; that he would keep specified information concerning Oxford or its clients confidential; that he would complete certain forms and provide required documents within three business days of his start date; and that he would not knowingly transfer specified technology, items, or products of the client to any foreign entity without written authorization from Oxford and the client. “ ‘A single and undivided consideration may be bargained for and given as the agreed equivalent of one promise or of two promises or of many promises.’ ” (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 679 (*Foley*); accord, *Martin v. World Savings & Loan Assn.* (2001) 92 Cal.App.4th 803, 809 [“one promise in a contract ‘may be consideration for several counter promises’ ”].) In the employment context, “an employee’s *promise* to render services, or his actual rendition of services over time” may support an employer’s promise to pay a particular wage. (*Foley, supra*, at p. 679, italics added.) Because both plaintiff and Oxford made promises in the written consultant agreement, the agreement is a bilateral contract.

## **ii. Whether the written consultant agreement was illusory**

Regarding the written consultant agreement, plaintiff next contends that “any purported bilateral contract was illusory.” In support of this argument, plaintiff relies on Civil Code section 3390, which provides that certain “obligations cannot be specifically enforced,” including “[a]n obligation to render personal service.” (*Id.*, subd. (a).) He also relies on “California’s presumption of at-will employment” which plaintiff explains in this case “means that Defendant could terminate [his] employment at any time after it commenced.” (See Lab. Code, § 2922.)

We are not persuaded by plaintiff’s argument. Plaintiff fails to provide legal authority for the proposition that a contract involving personal services is illusory or otherwise unenforceable due to the fact that the remedy of specific performance is unavailable. To the contrary, a personal service contract may be enforced in an action for damages. (*Barndt v. County of L.A.* (1989) 211 Cal.App.3d 397, 404 [“In lieu of specific performance, the remedy for breach of a personal service contract is an action for damages.”].)

Plaintiff also fails to provide persuasive legal authority for the proposition that all contracts involving at-will employment in California are illusory, or that the particular consultant agreement in this case is illusory. Elsewhere in his opening brief on appeal, plaintiff quotes from *Grouse, supra*, 306 N.W.2d 114, a case in which a Minnesota court determined that no at-will employment contract existed between the plaintiff and the prospective employer “because due to the bilateral power of termination neither party is committed to performance and the promises are, therefore, illusory.” (*Id.* at p. 116.) The Minnesota court determined that the plaintiff could, however, seek damages under the doctrine of promissory estoppel. (*Ibid.*) Aside from the fact that *Grouse* is a Minnesota case, *Grouse* does not cite any authority in support of its conclusion that the at-will employment contract was illusory, and therefore we do not find it helpful to plaintiff on this point.

Plaintiff also cites *Sheppard, supra*, 218 Cal.App.3d 61, a California appellate court opinion that relied on *Grouse*. *Sheppard*, however, did not expressly rely on *Grouse*'s holding that a contract containing the bilateral power of termination is illusory. (See *Sheppard, supra*, at p. 67.) As explained above, in *Sheppard*, the plaintiff accepted an offer to work in Memphis, quit his job in California, but was terminated by the prospective employer before he actually commenced working. (*Id.* at pp. 64-65.) *Sheppard* relied on *Grouse*, among other authorities, in determining that summary judgment should not have been granted in the employer's favor on the plaintiff's claims for breach of contract, fraud, and wrongful termination. (*Id.* at pp. 64, 66-68.) In reaching this conclusion, *Sheppard* relied on the doctrine of promissory estoppel and applied the following reasoning from *Grouse*: “ ‘the [plaintiff] had a right to assume he would be given a good faith opportunity to perform his duties to the satisfaction of [defendant] once he was on the job.’ [Citation.]” (*Sheppard, supra*, at p. 67.) The appellate court in *Sheppard* also stated that “implicit in . . . an employment agreement, and certainly implicit within the implied covenant of good faith and fair dealing, is the understanding that an employer cannot expect a new employee to sever his former employment and move across the country only to be terminated before the ink dries on his new lease, or before he has had a chance to demonstrate his ability to satisfy the requirements of the job.” (*Ibid.*) The fact that the California appellate court in *Sheppard* allowed the plaintiff to proceed on a *breach of contract* theory indicates that the court did *not* adopt the Minnesota court's conclusion in *Grouse* that an at-will employment contract is necessarily illusory and unenforceable.

Indeed, under California law, contracts with termination provisions are not necessarily illusory. For example, as plaintiff acknowledges in his reply brief on appeal, in *Thrifty Payless, Inc. v. Mariners Mile Gateway, LLC* (2010) 185 Cal.App.4th 1050 (*Thrifty*), the appellate court explained that “a contract with a mutual termination provision is not illusory when conditioned on notice.” (*Id.* at p. 1063.) The appellate

court determined that in the lease before it, “each party had the right to terminate, and the rest of the lease included mutual obligations as well. The lease was binding until it was terminated according to its terms. Thus, we find the lease was not illusory.” (*Id.* at pp. 1063-1064.) Plaintiff here attempts to distinguish *Thrifty* by contending that the written consultant agreement and his employment relationship with Oxford could be terminated at any time *without* notice. To the contrary, the written consultant agreement states only that “advance” notice is not required to terminate the employment relationship.<sup>1</sup> A lack of “advance” notice is not the same as having no notice. For example, at-will employment in California still requires notice of termination. (See Lab. Code, § 2922 [at-will employment “may be terminated at the will of either party on notice to the other”].)

To the extent that plaintiff contends the written consultant agreement was illusory because it allowed Nutanix (rather than Oxford) to “change or cancel[]” the start date, we are not persuaded by plaintiff’s contention. Nutanix’s ability to change or cancel the start date was not a circumstance “ ‘wholly under [Oxford’s or plaintiff’s] control,’ ” and thus this provision did not make the written consultant agreement between Oxford and plaintiff illusory. (*Hansen Pacific Corp. v. Buck Mountain Logging Co.* (1961) 191 Cal.App.2d 826, 832.)

**iii. Whether the “change or cancellation” language in the written consultant agreement applied only after plaintiff commenced working**

In the first amended complaint, plaintiff alleged that the language in the written consultant agreement regarding his start date at Nutanix being “[s]ubject to change or cancellation” was understood by all parties to mean that his “employment/placement with Nutanix was ‘at will’ and could be altered or cancelled, but not that the

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<sup>1</sup> We note that the written consultant agreement also states: “Consultant agrees to provide Oxford five (5) business days notice of intent to terminate any assignment with Oxford.”

employment/placement would never commence . . . .” On appeal, plaintiff continues to contend that the cancellation language in the written consultant agreement may reasonably be construed “as simply a restatement of the at-will doctrine that would apply upon the commencement of the job . . . .” Before analyzing plaintiff’s contention, we first set forth the general rules regarding contract interpretation and parol evidence.

#### **a) contract interpretation**

“The fundamental rules of contract interpretation are based on the premise that the interpretation of a contract must give effect to the ‘mutual intention’ of the parties. ‘Under statutory rules of contract interpretation, the mutual intention of the parties at the time the contract is formed governs interpretation. [Citation.] Such intent is to be inferred, if possible, solely from the written provisions of the contract. [Citation.]’ ” (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 18 (*Waller*).) Generally, “ ‘[t]he whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.’ [Citation.]” (*Boghos v. Certain Underwriters at Lloyd’s of London* (2005) 36 Cal.4th 495, 503.) This “rule’s effect, among other things, is to disfavor constructions of contractual provisions that would render other provisions surplusage. [Citation.]” (*Ibid.*)

#### **b) parol evidence rule**

“The parol evidence rule . . . establishes that the terms contained in an integrated written agreement may not be contradicted by prior or contemporaneous agreements.” (*Casa Herrera, supra*, 32 Cal.4th at p. 344.) “ ‘An integrated agreement is a writing or writings constituting a final expression of one or more terms of an agreement.’ [Citations.]” (*Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Assn.* (2013) 55 Cal.4th 1169, 1174 (*Riverisland*).) The parol evidence rule “ ‘generally prohibits the introduction of any extrinsic evidence, whether oral or written, to vary, alter or add to the terms of an integrated written instrument.’ [Citation.] The rule does not, however, prohibit the introduction of extrinsic evidence ‘to explain the meaning of a

written contract . . . [if] the meaning urged is one to which the written contract terms are reasonably susceptible.’ [Citation.]” (*Casa Herrera, supra*, at p. 343.) In other words, “parol evidence is admissible only to prove a meaning to which the language is ‘reasonably susceptible’ [citation], not to flatly contradict the express terms of the agreement.” (*Winet v. Price* (1992) 4 Cal.App.4th 1159, 1167 (*Winet*).)

A contractual provision “will be considered ambiguous when it is capable of two or more constructions, both of which are reasonable. [Citation.]” (*Waller, supra*, 11 Cal.4th at p. 18.) “Where the meaning of the words used in a contract is disputed, the trial court must provisionally receive any proffered extrinsic evidence which is relevant to show whether the contract is reasonably susceptible of a particular meaning. [Citations.] . . . Even if a contract appears unambiguous on its face, a latent ambiguity may be exposed by extrinsic evidence which reveals more than one possible meaning to which the language of the contract is yet reasonably susceptible. [Citations.]” (*Morey v. Vannucci* (1998) 64 Cal.App.4th 904, 912; accord, *Winet, supra*, 4 Cal.App.4th at p. 1165.)

Relevant parol evidence includes the parties’ discussions at the time the contract was negotiated, but not a party’s “uncommunicated subjective intent as to the meaning of the words of the contract.” (*Winet, supra*, 4 Cal.App.4th at p. 1167; see *id.* at p. 1166, fn. 3; *Reigelsperger v. Siller* (2007) 40 Cal.4th 574, 579 (*Reigelsperger*) [a contracting party’s “uncommunicated subjective intent is irrelevant”].) Relevant parol evidence may also include “the circumstances which attended the making of the agreement, ‘ . . . including the object, nature and subject matter of the writing . . .’ so that the court can “place itself in the same situation in which the parties found themselves at the time of contracting.” [Citations.]’ [Citation.]” (*Winet, supra*, at p. 1168; see Code Civ. Proc., § 1860.)

“In the context of a demurrer, the court must conditionally consider the parol evidence alleged in the complaint, to determine if it would be relevant to prove a meaning

to which the language of the instrument is reasonably susceptible.” (*George v. Automobile Club of Southern California* (2011) 201 Cal.App.4th 1112, 1122.) If, after considering the sufficiency of the plaintiff’s allegations, including any parol evidence allegations, the court determines that the plaintiff’s allegations do not support an interpretation to which the contract is reasonably susceptible, a demurrer is properly sustained. (*Id.* at pp. 1127-1128.)

**c) analysis**

We are not persuaded by plaintiff’s allegations and argument that the “[s]ubject to change or cancellation” language in the written consultant agreement was “simply a restatement of the at-will doctrine” that applied only upon the commencement of his assignment at Nutanix, and that his start date at Nutanix could not be cancelled pursuant to the terms of the agreement.

First, based on the language and location of the “change or cancellation” provision in the agreement, plaintiff’s contention that his start date was *not* subject to change or cancellation before he started work is contrary to any reasonable construction of the agreement. The agreement includes 13 numbered paragraphs. The numbered paragraph 3 addresses the at-will nature of plaintiff’s employment with Oxford and the at-will nature of plaintiff’s assignment at Nutanix. More than ten paragraphs later, after the last numbered paragraph 13, the agreement sets forth the details of plaintiff’s assignment at the “Client Company” Nutanix, including plaintiff’s position/title, work location, manager to whom he will report, and work hours. This portion of the agreement also specifies that plaintiff’s “Start Date” is February 15, 2016. Immediately below the start date, the agreement states, “Subject to change or cancellation by Client.” This “change or cancellation” provision does not in any way indicate that it only operates *after* employment has commenced. To the contrary, the placement of this language immediately below the specified start date for plaintiff’s assignment at Nutanix readily indicates that the start date itself was “[s]ubject to change or cancellation by Client”

Nutanix. Moreover, given that the “change or cancellation” language is immediately below the specified start date, but separated by 11 paragraphs from the paragraph concerning at-will employment/assignment, the “change or cancellation” language is not reasonably susceptible to the construction that the start date at Nutanix is “simply a restatement of the at-will doctrine” that would apply *only* upon commencement of the job, as urged by plaintiff on appeal.

Second, even after taking into consideration the parol evidence alleged by plaintiff, we are not persuaded that the “change or cancellation” language in the written consultant agreement may reasonably be construed to apply only *after* employment has commenced and not before. None of the alleged conversations between Nutanix, Oxford, and/or plaintiff involved the specific content of the written consultant agreement, let alone the “change or cancellation” language.

Indeed, nothing in the pleading indicates that Nutanix knew the content of the written consultant agreement, which was signed only by Oxford and plaintiff. To the contrary, the allegations reflect that there was *confusion* by Nutanix about what, if any, contract was signed. For example, on February 9, 2016, Oxford asked Nutanix what time plaintiff should arrive for work on February 15, 2016. Nutanix responded, “ ‘You didn’t tell [plaintiff] that his start date is on the 15th did you? *We haven’t finalized the contract yet.*’ ” (Italics added.) Oxford replied that plaintiff had to give notice to his employer, and that “ ‘[t]his should not be an issue *since the contract has been agreed upon and signed by both parties.*’ ” (Italics added.) Nutanix responded, “ ‘*I’m not sure I understand what you mean – Why did he have to put in his notice? I told you that he shouldn’t do a single thing until we have a fully signed contract in place.*’ ” (Italics added.) Nutanix later asked Oxford, “ ‘I’m wondering why we gave [plaintiff] a start date *before the contract was finalized?*’ ” (Italics added.) Oxford replied, “ ‘If we hadn’t *acted on our side* at the time you decided you wanted to move forward with [plaintiff], he would not have been available at all.’ ” (Italics added.) These communications reflect

Nutanix's confusion about Oxford and plaintiff having signed a contract. These communications and the other communications alleged in the first amended complaint do not demonstrate any understanding on Nutanix's part about the substance or meaning of the written consultant agreement. At the same time, the Oxford employee who made these statements, and most of the other statements attributed to Oxford in the first amended complaint, was not the employee who signed the written consultant agreement on behalf of Oxford. There is no indication in the first amended complaint that this Oxford employee who made these statements was familiar with all the language in the written consultant agreement, or that he had an understanding about the "change or cancellation" language in particular.

Moreover, according to the first amended complaint, Nutanix's and Oxford's legal departments were "involved in the conversation" regarding the use of a "master consulting agreement" and a "Statement of Work." However, the particular Nutanix and Oxford employees who were communicating about plaintiff's hiring stated that they were *unclear* about the substance and meaning of those documents. For example, the Nutanix employee stated, " 'Although *I'm not going to claim I understand that document*, what I do know is that I need our corporate controller to sign anything that has to do with payment terms – and he will not do so until its [sic] cleared by legal.' " (Italics added.) The Oxford employee responded, " 'I totally understand. *The legal terms in that contract totally go over my head.*' " (Italics added.) In view of these employees' admitted lack of understanding of the meaning of contracts potentially governing a consultant such as plaintiff, no significance can be ascribed to any statements by these particular employees concerning their understanding, if any, of the terms of the written consultant agreement actually signed by plaintiff.

Plaintiff also relies on allegations concerning an incident that apparently involved another prospective employee of Oxford and Nutanix. (That person's name is redacted from the first amended complaint.) However, the pleading only contains vague

references to that other incident. There are no allegations indicating that the prospective employee signed the same written consultant agreement as plaintiff, or otherwise signed an agreement where the start date was expressly “[s]ubject to change or cancellation.”

Plaintiff also alleged in the first amended complaint that he “belie[ved] that . . . he would in fact be permitted to start work for [d]efendants.” Further, he “understood” the “[s]ubject to change or cancellation” language in the written consultant agreement meant that his employment at Nutanix was at will, “but not that the employment/placement would never commence.” These allegations are insufficient because a plaintiff’s “uncommunicated subjective intent is irrelevant” as to the meaning of the words of a contract. (*Reigelsperger, supra*, 40 Cal.4th 574, 579; *Winet, supra*, 4 Cal.App.4th at p. 1167; see *Winet, supra*, at p. 1166, fn. 3.)

In sum, after reviewing the written consultant agreement and the alleged parol evidence in plaintiff’s first amended complaint, we determine that the “change or cancellation” language is not reasonably susceptible to the construction urged by plaintiff that his assignment at Nutanix was subject to change or cancellation only after he commenced working. We conclude that the only reasonable construction of the written consultant agreement is that plaintiff’s start date was “[s]ubject to change or cancellation by Client” Nutanix even prior to commencement of work.

Accordingly, the trial court properly sustained Oxford’s demurrer to the first cause of action for promissory estoppel without leave to amend.

## **2. Second Cause of Action for Breach of an Implied Contract**

Plaintiff contends that he sufficiently alleged a cause of action for breach of an implied contract. In the first amended complaint, plaintiff alleged that the written consultant agreement was illusory and lacked consideration, but that he “nevertheless entered into an implied contract with [defendants] . . . that he would start work as a Devops Engineer with [Nutanix] on February 15, 2016.” The implied contract was allegedly “manifested by the conduct of the parties,” including plaintiff interviewing with

Nutanix and being provided with a start date. Plaintiff alleged that defendants breached the implied contract by telling him that there was a hiring freeze, and that he would not be starting work at Nutanix. Plaintiff alleged the implied contract claim “as an alternative cause of action and in the event that . . . [he] cannot bring a cause of action for promissory estoppel.”

As we have explained above, plaintiff fails to establish that the written consultant agreement was illusory and lacked consideration. In view of the valid, written consultant agreement, “ ‘[t]here cannot be a valid express contract and an implied contract, each embracing the same subject, but requiring different results.’ [Citations.] The express term is controlling . . . .” (*Camp v. Jeffer, Mangels, Butler & Marmaro* (1995) 35 Cal.App.4th 620, 630.) In this case, the written consultant agreement expressly provided that plaintiff’s February 15, 2016 start date was “[s]ubject to change or cancellation” by Nutanix. This express agreement precludes the existence of an implied contract requiring that plaintiff start on a certain date without any change or cancellation of the date. (See *ibid.*)

Accordingly, because plaintiff failed to sufficiently allege the existence of an implied contract requiring that he start working on a certain date, the trial court properly sustained Oxford’s demurrer to the second cause of action for breach of an implied contract without leave to amend.

### **3. Third Cause of Action for Breach of the Implied Covenant of Good Faith and Fair Dealing**

Plaintiff contends that he sufficiently alleged a cause of action for breach of the implied covenant of good faith and fair dealing. In the first amended complaint, plaintiff alleged that defendants breached the implied covenant of good faith and fair dealing “by not permitting [him] to commence work.”

“ ‘ “Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.” [Citation.]’ ” (*Carma Developers (Cal.), Inc. v.*

*Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 371 (*Carma Developers*).) “The covenant of good faith finds particular application in situations where one party is invested with a discretionary power affecting the rights of another. Such power must be exercised in good faith. [Citations.]” (*Id.* at p. 372.)

However, “no reported case . . . has held the covenant of good faith may be read to prohibit a party from doing that which is expressly permitted by an agreement. On the contrary, as a general matter, implied terms should never be read to vary express terms. [Citations.] ‘The general rule [regarding the covenant of good faith] is plainly subject to the exception that the parties may, by express provisions of the contract, grant the right to engage in the very acts and conduct which would otherwise have been forbidden by an implied covenant of good faith and fair dealing. . . . [¶] This is in accord with the general principle that, in interpreting a contract “an implication . . . should not be made when the contrary is indicated in clear and express words.” [Citation.] . . . [¶] As to acts and conduct authorized by the express provisions of the contract, no covenant of good faith and fair dealing can be implied which forbids such acts and conduct. And if defendants were given the right to do what they did by the express provisions of the contract there can be no breach.’ [Citation.]” (*Carma Developers, supra*, 2 Cal.4th at p. 374.)

In this case, the written consultant agreement between Oxford and plaintiff expressly stated that plaintiff’s start date of February 15, 2016 was “[s]ubject to change or cancellation by Client” Nutanix. Thus, under the agreement, Oxford had the right not to start plaintiff’s assignment at Nutanix on the specified date if Nutanix changed or cancelled the date. As such conduct by Oxford was “ ‘authorized by the express provisions of the contract, no covenant of good faith and fair dealing can be implied which forbids such acts and conduct.’ ” (*Carma Developers, supra*, 2 Cal.4th at p. 374.) And because the express provisions of the contract gave Oxford “ ‘the right to do what

[it] did' ” in not permitting plaintiff to start working, there can be no breach of the implied covenant of good faith and fair dealing. (*Ibid.*)

Plaintiff contends that, based on *Sheppard, supra*, 218 Cal.App.3d 61, a claim for breach of the implied covenant of good faith and fair dealing may be brought when “a promised job does not materialize and the prospective employee is harmed by reliance on that job offer.” Quoting from *Sheppard*, plaintiff argues that “implicit within the implied covenant of good faith and fair dealing[] is the understanding that an employer cannot expect a new employee to sever his former employment and move across the country only to be terminated before the ink dries on his new lease, or before he has had a chance to demonstrate his ability to satisfy the requirements of the job.” (*Sheppard, supra*, at p. 67.) However, in contrast to *Sheppard*, plaintiff here had a written consultant agreement with his prospective employer Oxford that expressly provided that his start date was “[s]ubject to change or cancellation” by the client Nutanix. As we have explained, no claim may be stated for breach of the implied covenant where the express terms of the agreement authorized the conduct at issue here, that is, Oxford did not permit plaintiff to start work on a specified date due to a “change or cancellation” by Nutanix.

Accordingly, the trial court properly sustained the demurrer to the third cause of action for breach of the implied covenant of good faith and fair dealing without leave to amend.

#### **4. Fourth Cause of Action for Negligent Misrepresentation**

Plaintiff contends that he sufficiently alleged a cause of action for negligent misrepresentation. In the first amended complaint, plaintiff alleged that Oxford—and Nutanix through its agent Oxford—represented to him that “Nutanix . . . had arranged for plaintiff to start work at Nutanix on February 15, 2016.” (Some capitalization omitted.) According to plaintiff, “[t]hese representations, that Nutanix had agreed to have [him] start work on February 15, 2016, were not true.” (Some capitalization omitted.) Plaintiff alleged that Oxford intended for plaintiff to rely on the representation, but that it had no

reasonable grounds for believing the representations were true because Nutanix told Oxford that plaintiff “shouldn’t do a single thing until we have a fully signed contract in place.” Plaintiff alleged that he reasonably relied on the representations and that he was harmed as a result because “he forwent his wages and benefits” by resigning from his previous employer and “refrained from pursuing other opportunities after he agreed to commence work for” Nutanix.

“The elements of negligent misrepresentation are (1) a misrepresentation of a past or existing material fact, (2) made without reasonable ground for believing it to be true, (3) made with the intent to induce another’s reliance on the fact misrepresented, (4) justifiable reliance on the misrepresentation, and (5) resulting damage.” [Citations.]” (*Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 196.)<sup>2</sup> Further, a negligent misrepresentation claim must be based on a “ ‘positive assertion[.]’ [Citation.] ‘An “implied” assertion or representation is not enough. [Citations.]’ [Citations.]” (*Diediker v. Peelle Financial Corp.* (1997) 60 Cal.App.4th 288, 297-298 (*Diediker*).)

In this case, the fourth cause of action for negligent misrepresentation was based on the alleged representation(s) by defendants that “Nutanix . . . had arranged for plaintiff to start work at Nutanix on February 15, 2016.” (Some capitalization omitted.) Unlike other alleged statements in the first amended complaint that identified the individual speaker and the date a particular statement was made, this alleged representation was not accompanied by any allegation regarding who made it or when. Oxford, in its demurrer, argued that plaintiff failed to allege an express misrepresentation, and that his allegations amounted to “implied assertions” that were based on his purported belief from

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<sup>2</sup> We note that plaintiff, in attempting to set forth the elements of a negligent misrepresentation claim, cites a jury instruction as his only authority. He likewise cites jury instructions as authority for various other points in his opening brief on appeal. The California Supreme Court has “caution[ed] that jury instructions, whether published or not, are not themselves the law, and are not authority to establish legal propositions or precedent. . . . At most, when they are accurate, . . . they restate the law. (*People v. Morales* (2001) 25 Cal.4th 34, 48, fn. 7.)

unspecified communications. In opposition, plaintiff argued that Oxford had “ignore[d] the fact that the negligent misrepresentation cause of action incorporates all the prior allegations of the [first amended complaint] by reference.” “Thus,” according to plaintiff, “all communications” alleged in the prior paragraphs of the first amended complaint were included in the negligent misrepresentation cause of action. Plaintiff further explained that “[t]hese include communications from Oxford to [plaintiff] that ‘Nutanix wants to move forward,’ ‘David [of Nutanix] went to his Boss to get final sign off,’ ‘Congrats [plaintiff] Ben. I emailed you the details,’ and the Consultant Agreement itself.”

Based on Oxford’s demurrer, plaintiff’s opposition to the demurrer, and the allegations of the first amended complaint, including the attached written consultant agreement, it is apparent that the representation alleged in the fourth cause of action—that “Nutanix . . . had arranged for plaintiff to start work at Nutanix on February 15, 2016” (some capitalization omitted)—was not an express representation to plaintiff, but rather was an implied representation based on *other* statements by Oxford, such as “ ‘Nutanix wants to move forward,’ ” “ ‘David [of Nutanix] went to his Boss to get final sign off,’ ” “ ‘Congrats [plaintiff] Ben. I emailed you the details,’ ” and the written consultant agreement. However, “ ‘[a]n “implied” assertion or representation is not enough’ ” to state a claim for negligent misrepresentation. (*Diediker, supra*, 60 Cal.App.4th at p. 298.)

On appeal, plaintiff contends that defendants represented that “there was a job at Nutanix,” and that he “had been selected for that job.” Plaintiff does not provide a record citation showing that these particular express representations were alleged in the first amended complaint.

Plaintiff also contends on appeal that “Oxford (which . . . was acting as an agent for Nutanix), promised [plaintiff] a job and intended that [he] rely on that promise, when

Oxford knew or should have known that no job even existed yet (and might never exist). This is negligent misrepresentation.”

We are not persuaded by plaintiff’s argument that he may state a claim for negligent misrepresentation based on an alleged promise of a job. “A representation generally is not actionable unless it is about ‘past or existing facts.’ [Citation.] Although a false promise to perform in the future can support an *intentional* misrepresentation claim, it does not support a claim for *negligent* misrepresentation. [Citation.]” (*Stockton Mortgage, Inc. v. Tope* (2014) 233 Cal.App.4th 437, 458 (*Stockton Mortgage*)).

For example, in *Tarmann v. State Farm Mut. Auto. Ins. Co.* (1991) 2 Cal.App.4th 153 (*Tarmann*), this court determined that the defendant car insurance company’s representation that “it would pay for [the plaintiff insured’s] repairs immediately upon their completion” did not support a claim for negligent misrepresentation. (*Tarmann, supra*, at p. 158, italics omitted; *see id.* at p. 159.) This court explained that “[t]he critical alleged misrepresentation as to immediate payment upon completion did not involve a past or existing material fact. Rather, it involved a promise to perform at some future time.” (*Id.* at p. 158.)

Here, plaintiff’s contention that “Oxford . . . promised [him] a job,” or the alleged representation in the fourth case of action that plaintiff would “start work at Nutanix on February 15, 2016” (some capitalization omitted), all “involve[] a promise to perform at some future time” and cannot be the basis for a negligent misrepresentation claim. (*Tarmann, supra*, 2 Cal.App.4th at p. 158; *see id.* at p. 159; *Stockton Mortgage, supra*, 233 Cal.App.4th at p. 458.)

Accordingly, the trial court properly sustained the demurrer to the fourth cause of action for negligent misrepresentation without leave to amend.

## **5. Fifth Cause of Action for Fraud**

Plaintiff contends that he sufficiently alleged fraud against Oxford. In the first amended complaint, plaintiff alleged that (1) Oxford “intentionally failed to disclose” to

him that Nutanix did not want him to resign from his existing job at the time he signed the written consultant agreement “and/or” (2) Oxford “intentionally represented” to him “that he had definitely and finally been selected for the Devops Engineer position with Nutanix and therefore he should resign his employment when in fact he had not been so selected.” (Some capitalization omitted.) Oxford allegedly intended to deceive plaintiff by concealing the information and/or intended that plaintiff rely on its representation. Plaintiff alleged that he did not know that Nutanix did not want him to take any action with respect to his existing employment when he resigned. Plaintiff further alleged that he reasonably relied on the deception and/or representation by Oxford by resigning from his employment on January 28, 2016, and by refraining from pursuing other opportunities after he agreed to work for Nutanix, and that he suffered harm.

Regarding Oxford’s alleged knowledge of falsity, plaintiff in the first amended complaint referred to the exchange of e-mails between Nutanix and Oxford on February 9, 2016. Nutanix allegedly wrote to Oxford, “ ‘I told you that [plaintiff] shouldn’t do a single thing until we have a fully signed contract in place.’ ” Later during the same conversation, Oxford responded to Nutanix by stating, “ ‘If we hadn’t acted on our side at the time you decided you wanted to move forward with [plaintiff], he would not have been available at all. He had an offer on the table and three other interviews scheduled for the same week. All of those other opportunities were through other agencies. It has been almost three weeks (Jan 22nd) since you decided you wanted to move forward with [plaintiff]. Crazy things can happen in that span of time.’ ” Plaintiff alleged that Oxford’s statement showed that it “was concerned about losing plaintiff as a candidate and a potential source of income if the process of plaintiff being hired by Nutanix took too long.” (Some capitalization omitted.)

“ ‘The elements of fraud, which give rise to the tort action for deceit, are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or “scienter”); (c) intent to defraud, i.e., to induce reliance;

(d) justifiable reliance; and (e) resulting damage.’ [Citations.]” (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638 (*Lazar*).) Regarding knowledge of falsity, the defendant must know that the representation was false at the time it was made, or the defendant must make the representation recklessly and without regard for its truth. (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 974 (*Engalla*); accord, *Manderville v. PCG&S Group, Inc.* (2007) 146 Cal.App.4th 1486, 1498.)

“[F]raud must be pled specifically; general and conclusory allegations do not suffice. [Citations.] ‘Thus “ ‘the policy of liberal construction of the pleadings . . . will not ordinarily be invoked to sustain a pleading defective in any material respect.’ ” [Citation.]’ ” (*Lazar, supra*, 12 Cal.4th at p. 645.) The specificity requirement serves two purposes. The first purpose is “ ‘to allow defendant to understand fully the nature of the charge made.’ [Citations.]” (*Tarmann, supra*, 2 Cal.App.4th at p. 157.) “The second is to permit a court to weed out meritless fraud claims on the basis of the pleadings; thus, ‘the pleading should be sufficient “ ‘to enable the court to determine whether, on the facts pleaded, there is any foundation, prima facie at least, for the charge of fraud.’ ” ’ [Citation.]” (*West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, 793.)

In its demurrer, Oxford contended that (1) its alleged misrepresentation or concealment of facts did not occur until *after* plaintiff’s alleged act of reliance in resigning, (2) the other allegation of reliance that he “refrain[ed] from pursuing other opportunities after he agreed to commence work for [Nutanix]” was an allegation that “lack[ed] any particularity,” and (3) plaintiff could not allege justifiable reliance when the written consultant agreement explicitly provided that his start date was subject to cancellation.

On appeal, plaintiff contends that the February 9, 2016 communications show Oxford’s state of mind when it earlier represented in the written consultant agreement that he would be starting at Nutanix on a specific date. Plaintiff argues that, in view of his further allegation that Oxford was concerned about losing him to another agency if

the hiring process with Nutanix took too long, Oxford knowingly or recklessly misrepresented that he had been selected for placement at Nutanix with a start date of February 15, 2016, “when in fact he had not been so selected.”

We determine that plaintiff’s allegations regarding misrepresentation/concealment and reliance, which were the elements that Oxford challenged in its demurrer, were sufficiently alleged. Although some of plaintiff’s alleged evidence of concealment arises from e-mails between Nutanix and Oxford on February 9, 2016, which is after plaintiff’s January 28, 2016 resignation, the content of these e-mails appear to refer to *earlier* conduct and knowledge by Oxford. For example, in response to Nutanix’s question about why Oxford gave plaintiff a start date before the companies had “ ‘finalized’ ” a contract between themselves, Oxford stated to Nutanix in a February 9, 2016 e-mail, “ ‘If we hadn’t acted on our side at the time you decided you wanted to move forward with [plaintiff], he would not have been available at all. He had an offer on the table and three other interviews scheduled for the same week. All of those other opportunities were through other agencies. It has been almost three weeks (Jan 22nd) since you decided you wanted to move forward with [plaintiff]. Crazy things can happen in that span of time.’ ” Oxford’s reference to the “act[s] on [its] side” may reasonably be understood to include its earlier offer of employment to plaintiff and the execution of the written consultant agreement, which were acts that it knowingly took with plaintiff before it had a contract with Nutanix. Plaintiff accordingly alleged that “at the time that [he] signed the Consultant Agreement,” Oxford intentionally misrepresented that he had been “definitely and finally” selected for the position at Nutanix and intentionally failed to disclose that Nutanix did not want him to resign. The misrepresentation and failure to disclose at this point allegedly resulted in plaintiff’s reliance by resigning from his existing job and refraining from pursuing other opportunities.

We believe that plaintiff is not necessarily precluded from establishing justifiable reliance in resigning his employment even though the written consultant agreement

explicitly provided that his start date was subject to cancellation. Although the parol evidence rule prohibits the introduction of extrinsic evidence to alter or add to the terms of an integrated written instrument, “an established exception to the rule allows a party to present extrinsic evidence to show that the agreement was tainted by fraud.” (*Riverisland, supra*, 55 Cal.4th at p. 1172; see *id.* at pp. 1174-1175, 1182.) Thus, “extrinsic evidence is admissible to establish fraud . . . in the face of [a contract’s] integration clause.” (*Thrifty Payless, Inc. v. The Americana at Brand, LLC* (2013) 218 Cal.App.4th 1230, 1241.)

In this case, Oxford’s initial communications to plaintiff in the days leading up to the signing of the consultant agreement indicated that Oxford was waiting for a “ ‘formal offer’ ” and a “ ‘final sign off’ ” from Nutanix. Oxford subsequently texted plaintiff a message of congratulations and told him to bring various documents needed by newly hired employees, such as a social security card and a voided check for direct deposit. These communications, combined with the written consultant agreement, could reasonably lead a prospective employee to believe that Nutanix had, as alleged by plaintiff, “definitely and finally” agreed to his assignment at its worksite, and that he should go ahead and give his notice of resignation to his current employer.

Further, “a presumption, or at least an inference, of reliance arises wherever there is a showing that a misrepresentation was material. [Citation.] A misrepresentation is judged to be ‘material’ if ‘a reasonable man [or woman] would attach importance to its existence or nonexistence in determining his [or her] choice of action in the transaction in question’ [citations], and as such materiality is generally a question of fact unless the ‘fact misrepresented is so obviously unimportant that the jury could not reasonably find that a reasonable man [or woman] would have been influenced by it.’ [Citation.]” (*Engalla, supra*, 15 Cal.4th at p. 977.)

Here, we cannot conclude as a matter of law that the alleged facts misrepresented or concealed from plaintiff—whether Nutanix had “definitely and finally” selected him

for the position and whether it wanted him to resign from his current job—were “so obviously unimportant that the jury could not reasonably find that a reasonable man [or woman] would have been influenced by it,” even taking into consideration that plaintiff knew pursuant to the written consultant agreement that the assignment at Nutanix was subject to change or cancellation. (*Engalla, supra*, 15 Cal.4th at p. 977.) To state it differently, we believe that a reasonable person might “attach importance to” (*ibid.*) whether a prospective new employer (or here, client company Nutanix) had “definitely and finally” selected the person for the job and whether that company wanted the person to resign from an existing job, even if that job offer might later be cancelled.

Oxford contends that plaintiff’s fraud cause of action in the first amended complaint was improper on procedural grounds. Oxford argues that after its demurrer was sustained to the original complaint, which only contained causes of action for promissory estoppel and breach of contract, plaintiff failed to obtain the trial court’s permission to add the fifth cause of action for fraud (as well as the third cause of action for breach of implied covenant of good faith and fair dealing and fourth cause of action for negligent misrepresentation). In this court, Oxford quotes from *Harris v. Wachovia Mortgage, FSB* (2010) 185 Cal.App.4th 1018, which provides that “[f]ollowing an order sustaining a demurrer . . . with leave to amend, the plaintiff may amend his or her complaint only as authorized by the court’s order. [Citation.] The plaintiff may not amend the complaint to add a new cause of action without having obtained permission to do so, unless the new cause of action is within the scope of the order granting leave to amend. [Citation.]” (*Id.* at p. 1023.) Oxford argues that the three new causes of action that plaintiff added to the first amended complaint, including the fraud cause of action, were therefore “procedurally improper, and their dismissal was justified on this basis alone.”

As Oxford acknowledges, however, “it substantively demurred to those [new] claims” in the first amended complaint. Consequently, the trial court ruled that, although

the three new causes of action “were added without leave and [were] subject to being struck on the Court’s own motion,” because “both demurring [d]efendants . . . addressed the additional claims alleged against them, the Court [would] treat the third, fourth and fifth causes of action as though they had [been] properly added.” On this record, where Oxford failed to demur to the newly added causes of action on the grounds that they were improperly added, and in view of the trial court’s ruling that it would treat those causes of action as though they had been properly added and address the substance of those causes of action in accordance with Oxford’s demurrer, Oxford fails to establish that dismissal of the fraud cause of action on procedural grounds is proper in this case. (See *Zakk v. Diesel* (2019) 33 Cal.App.5th 431, 456 [concluding that the trial court properly sustained a demurrer, where the defendants demurred on the ground that a cause of action was added without leave of court].)

In sum, we conclude that Oxford’s demurrer to the fifth cause of action for fraud should have been overruled. In addressing the legal sufficiency of plaintiff’s pleading, we express no opinion on “ ‘the question of plaintiff’s ability to prove these allegations.’ ” (*Committee on Children’s Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 214.)

### ***C. Nutanix’s Demurrer***

In the first amended complaint, plaintiff sought to hold Nutanix liable for Oxford’s alleged misdeeds based on allegations that Oxford was acting as an agent for Nutanix. Of the five causes of action alleged against Oxford, plaintiff alleged the same first four causes of action against Nutanix, that is, (1) promissory estoppel, (2) breach of implied contract, (3) breach of implied covenant of good faith and fair dealing, and (4) negligent misrepresentation. On appeal, plaintiff contends that he sufficiently alleged that Oxford was an ostensible agent of Nutanix.

A principal may be liable for the acts of an ostensible agent. (Civ. Code, § 2334; *J.L. v. Children’s Institute, Inc.* (2009) 177 Cal.App.4th 388, 403-404.) “An agency is

ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him.” (Civ. Code, § 2300.)

We need not decide whether plaintiff sufficiently alleged that Oxford was an ostensible agent of Nutanix. As we have explained, plaintiff failed to allege sufficient facts in the first four causes of action against Oxford itself. Consequently, because plaintiff failed to sufficiently allege any of the first four causes of action against Oxford, he necessarily failed to sufficiently allege any of the first four causes of action against Nutanix, even assuming Oxford was an ostensible agent of Nutanix.

Accordingly, the trial court properly sustained Nutanix’s demurrer to each of the four causes of action alleged against it.

## **V. DISPOSITION**

The judgment in favor of Oxford is reversed. The trial court is directed (1) to vacate the order sustaining Oxford’s demurrer and (2) to enter a new order sustaining the demurrer without leave to amend as to the first, second, third, and fourth causes of action and overruling the demurrer as to the fifth cause of action.

The judgment in favor of Nutanix is affirmed.

Oxford and Le are to bear their own costs. Costs are awarded to Nutanix.

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BAMATTRE-MANOUKIAN, J.

WE CONCUR:

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GREENWOOD, P.J.

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GROVER, J.

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